ISSUE DATE: January 27, 1999

In the Matter of

JOSEPH H. WEBB
Claimant

v.

SGS CONTROL SERVICES, INC.
Employer

and

CAN INSURANCE
Carrier

CASE NO.: 1998-LHC-0403

OWCP NO.: 03-26256

Appearances:

E. Alfred Smith, Esquire
For Claimant

John J. Daley, Esquire
For Employer

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding involves a claim for disability compensation filed by Joseph H. Webb, Claimant, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act).

A formal hearing was held in Camden, New Jersey on February 19, 1998, at which time all parties were afforded full opportunity to present evidence and arguments as provided in the Act and applicable regulations. At the hearing, Claimant's exhibits 1-11 and Employer's exhibits 1-11 were admitted into evidence. Additionally, the parties jointly submitted a stipulation sheet, which

was designated JX 1.[1] Both parties filed Proposed Findings of Fact and Conclusions of Law in the case, and Employer has moved to strike the Claimant's Proposed Findings of Fact and Conclusions of Law as untimely. Upon review, I note that by letter dated March 26, 1998, Claimant requested a ten day extension of time to file the Proposed Findings of Fact and Conclusions of Law in this matter, stating that due to his trial schedule, he had not had time to work on this matter. Defendant opposed Claimant's request. Upon review, I find that the Claimant has shown good cause for his request, and accordingly, Employer's Motion to Strike is denied.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

At the hearing, the following stipulations were entered into the record:

1. The Act (33 U.S.C. §§901-950) applies to this claim.

2. Claimant and Employer were in an employer-employee relationship at the time of the accident/injury.

3. The date of the accident/injury was March 15, 1996.

4. The date that Employer was advised or learned of the accident/injury was March 15, 1996.

5. It is agreed that timely notice of injury was given Employer.

6. It is agreed that Claimant filed a timely notice of claim.

7. Claimant's average weekly wage was $708.34.

8. The date of maximum improvement is July 15, 1996.

9. Claimant returned to work on July 16, 1996.

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[1] In this Decision, "DX" refers to Director's exhibits, "CX" refers to Claimant's exhibits, "JX" refers to joint exhibits, and "TX" refers to the pages of the transcript of the hearing of February 19, 1998.

10. Should this matter be deemed compensable, Claimant's medical bills were $2324.09.

ISSUES

Per the joint stipulation of the parties (JX 1), the following issues were presented for resolution:

1. Whether Claimant suffered a work injury on 3/15/96;

2. Whether Claimant's treatment is related to his alleged work injury;

3. Whether Claimant's disability as of 3/15/96 is causally related to his work injury.

SUMMARY OF THE EVIDENCE

Testimony of Joseph H. Webb

The Claimant, Joseph H. Webb, was employed by SGS Control Services as a Cargo Surveyor in 1996. (TX 42). The job required him to go on board oil tankers or in refineries to gauge the ships and take samples of the cargo on board. (TX 42-43). Once the samples were taken, he would either leave them on board to go up to the refinery with the ship or take them to the office. (TX 43). Most of the vessels that claimant worked on were located at Slaughter Beach, Delaware. (TX 43).

On March 15, 1996, Claimant's job was to sample the cargo from seven tanks on board the Nord Baltic. (TX 44-49). The ship was tied to the dock at Delaware City. (TX 44). The weather was rainy, and Claimant was wearing oil-resistant skid shoes with steel toes. (TX 85). Claimant was working with a crew member to take the samples. (TX 44). As Claimant was working, he claims that he slipped and fell. Claimant stated that: "I walked across the catwalk and as I started down the catwalk my feet slipped out from underneath of me. When I fell, I struck my lower part of my back, my buttock, and hit a flange and went down on the deck of the ship." (TX 44). After Claimant fell, the crew member helped him up and asked if he was all right. (TX 44). Then the crew member helped him back into the chief mate's office. (TX 44). On the way to the chief mate's office, Claimant stopped and talked to an SGS employee, Tony Mokienko, and told him that he had just hurt himself. (TX 44).

Claimant testified that the catwalk he fell on was a walking surface that ran over pipes. (TX 46). He stated that as he started down the ramp, his feet "just went right out from underneath of me." (TX 46). At the time of his fall, Claimant had a case of sample bottles in his

left hand. (TX 47). These were the bottles he used to collect the samples out of each tank. (TX 47).

After he fell, Claimant went back to the ramp with the captain to show him what had happened. (TX 47). Claimant testified that he slipped and fell again in front of the captain. (TX 48). The captain then started to walk back to his office. (TX 48). Claimant stopped him and asked him to please call Tony Mokienko so that he could show him what had happened and how slippery the ramp was. (TX 48). When Mr. Mokienko arrived, the captain would not allow claimant to go back on the ramp. (TX 48). Claimant had to ask him to move so that he could show Mr. Mokienko how slippery it was where he fell. (TX 48).

Claimant told Mr. Mokienko what had happened. (TX 49). Then the captain got someone to help Claimant to his truck, where he called his office and told them what had happened. (TX 49). He spoke to Lou Taylor, the operations manager, and told him that he was on his way to the hospital. (TX 50). This was the only report that he made to his employer that day. (TX 51). He filled out an accident report form on Monday, March 18. (TX 51).

Claimant drove home to get his x-rays, then he drove to the hospital. (TX 54). Claimant testified that he wanted his x-rays with him so that the hospital could make sure that nothing "broke loose." (TX 54). Claimant testified that he was concerned because he had a previous surgery in which six screws, two metal rods, four stabilizers, and a metal plate were inserted into his lower back. (TX 54). The surgery was performed by Dr. Charles Edwards at the University of Maryland. (TX 56). After the surgery and recuperation, Claimant testified that he was able to return to work full time and was able to do almost everything that he could do before, however, he could no longer play golf. (TX 57).

Since the accident of March 15, 1996, Claimant states that he has had numbness in his right foot that he did not have before the accident. (TX 58).

When Claimant arrived at the hospital, new x-rays were taken, and the doctor who examined Claimant said that everything appeared fine, but recommended that Claimant see his orthopedic surgeon, Dr. Drury, the following Monday. (TX 59). On Monday, Claimant saw Dr. Drury, who told him not to work until the pain decreased. (TX 59). Dr. Drury gave Claimant an excuse from work for two weeks. (TX 60). Claimant returned to see Dr. Drury on April 3, 1996. (TX 60). At that time, he had more numbness below the knee, and some backache. (TX 60). Dr. Drury recommended that Claimant have a bone scan done, and that Claimant not return to work until after the bone scan. (TX 60-61). Dr. Drury gave Claimant an excuse from work until April 11, after the bone scan. (TX 62). After the bone scan, Dr. Drury recommended that Claimant see Dr. Edwards before returning to work. (TX 62).

Claimant saw Dr. Edwards on April 30, 1996. (TX 63). Claimant testified that Dr. Edwards reviewed the x-rays and bone scan. (TX 65). Dr. Edwards stated that there was a slight herniation, and that the disk was irritated when he hit the catwalk, but that he felt it would heal

itself. (TX 65). Dr. Edwards told Claimant that he didn't want Claimant to do anything which would cause shock to his back. (TX 66). Dr. Edwards recommended that Claimant have a myelogram, however, Claimant never had a myelogram performed. (TX 136). Subsequently, Claimant saw Dr. Drury on May 9, and he returned Claimant to light duty. (TX 66).

Claimant sent Dr. Drury's evaluation to his employer, and spoke to Tom Bayerle. (TX 66). Mr. Bayerle told Claimant that there was no light duty work available, and that Claimant couldn't return to work until he could return to full duty. (TX 67). Then a week or so later, Mr. Bayerle called Claimant and told him that they wanted him to work in the Bridgeport office at 7:30 in the morning. (TX 74). Claimant testified that it is an hour and a half from his home in Milford, Delaware to the Bridgeport office. (TX 75). He estimated that the distance is approximately 200 miles, round trip. (TX 75). Claimant spoke to Dr. Drury about the possibility of working in Bridgeport, and Dr. Drury said that he did not want Claimant to drive that distance each day. (TX 75). As a result, Claimant saw Dr. Drury on May 13, 1996, and Dr. Drury gave Claimant a slip indicating that he could not return to work. (TX 75-76). Claimant saw Dr. Drury again on June 27, 1996 and on that date Dr. Drury told him that he would be able to return to full work on July 15 (TX 77). Claimant returned to work on July 16. (TX 77).

From March 15, 1996 to July 15, 1996, Claimant testified that he did not do any kind of work that was intended to earn any income. (TX 77). Claimant testified that the bills submitted as CX 8 were the bills that he incurred as a result of the accident of March 15, 1996. (TX 77). He stated that all of the bills were submitted to CNA, the worker's compensation carrier, but that the employer did not pay any of them. (TX 78).

Claimant testified that while he was off work, he stayed home and tried to stay off his back as much as possible so that it would heal. (TX 81). He did not play any golf during that period of time. (TX 80). However, he was a member of Shawnee Country Club during that time. (TX 145).

Claimant testified that he has owned a business called Blue Hen Auto Sales since 1990. (TX 124). He stated that he owned the business from March 15, 1996 to July 15, 1996, but that he did not have any income from the business during that period of time. (TX 125). He testified that he purchased two cars on July 12, 1996 as part of the business. (TX 126). He lost money on one car, and he has not yet determined whether he made money on the other car. (TX 126).

Testimony of Thomas Bayerle

Thomas Bayerle is the branch manager of the Bridgeport, New Jersey office of SGS Control Services, Inc. (TX 152). He has been branch manager since December 1, 1986. (TX 152). He stated that he hired Joseph Webb as petroleum surveyor. (TX 153). Mr. Bayerle testified that a petroleum surveyor samples the product in a vessel, measures the volume, and checks the temperature. (TX 154-157). To measure the volume of the product in a ship, the surveyor takes a ullage tape, and measures from the top of the hatch down to the top of the

product. (TX 155). Then the surveyor consults a table to determine the volume. (TX 155). Mr. Bayerle testified that a surveyor could have to carry up to three gallons of oil, which could weigh up to eighteen or nineteen pounds. (TX 161). Additionally, the surveyor may carry a cage, which weighs a pound at most. (TX 161). He stated that the surveyor should make two trips unless he has a bag to carry the oil in. (TX 161). The surveyor must carry the samples once or twice a day. (TX 163).

To get out to the ships, Claimant would have to ride a launch. (TX 191). Mr. Bayerle testified that usually the launch ride was half an hour. (TX 191). He is required to go, even when the weather is bad, unless the launches are not running due to dangerous conditions. (TX 191-192). Mr.Bayerle stated that sometimes the weather is choppy, and the seas are three to five feet high. (TX 192).

Mr. Bayerle stated that his understanding was that Claimant was crossing a ramp when he claimed to have fallen. (TX 162). He testified that a ramp was different from a catwalk. (TX 162). He stated that a catwalk was eight to ten feet off the ground and ran between a mid-ship house and the after-house. (TX 165). The catwalk was used to go between the two houses in inclement weather. (TX 166). Mr. Bayerle also testified that he understood that going across a ship meant to go from left to right or port to starboard. (TX 166). Mr. Bayerle stated that ramps on boats generally have side rails or cables so that a person crossing doesn't fall. (TX 167).

Mr. Bayerle testified that he was not present at the time of the incident. (TX 169). Additionally, he stated that he has no reports from anyone who witnessed the accident. (TX 169).

Mr. Bayerle testified that when he received Claimant's light duty slip, he spoke to Mr. Bloom about it. (TX 172). Mr. Bloom suggested that Mr. Webb come to the office and do paperwork. (TX 172). Mr. Bayerle testified that when he presented the idea to Mr. Webb, Mr. Webb stated that the distance would be great, and wanted to know how he would be reimbursed. (TX 172). Mr. Bayerle told him that he would pay his toll receipts and give him ten hours per day of pay, and eight dollars for meals. (TX 172-173). However, he told Mr. Webb that he could not reimburse him for mileage because all mileage emanates from the Bridgeport office. (TX 173). Mr. Webb told him that he would have to speak to his doctor. (TX 173). Then Mr. Bayerle told Mr. Bloom that Mr. Webb was speaking to his doctor, and Mr Bloom said that he did not want Mr. Webb to work in the office until the doctor said that it was okay. (TX 173).

Mr. Bayerle testified that Mr. Webb eventually left his job at the company due to an economic layoff. (TX 174). He stated that while Mr. Webb was employed he received good evaluations. (TX 196).

Mr. Bayerle stated that he spoke to Mr. Mokienko about whether he saw the accident, and Mr. Mokienko stated that he had not seen anything because he was on a different part of the ship at the time of the incident. (TX 177). Mr. Bayerle testified that he did not have any reason at the

time of the incident to doubt Mr. Webb's credibility, and that if he had, he would have spoken to more people to gather information. (TX 180-181).

Dr. Edwards' Notes

Claimant submitted Dr. Edwards' notes designated as CX 3. In a progress note dated April 30, 1996, Dr. Edwards reports that the patient fell on his job while inspecting a tank on a catwalk. (CX 3 at 1). The patient reported low back pain and progressive relative numbness over the L4 distribution of his right leg. (CX 3 at 1). Dr. Drury performed AP, lateral, and oblique x-rays, a bone scan, and electromyography, and Dr. Edwards reviewed these films and the report. (CX 3 at 1).

Upon physical examination, Dr. Edwards noted that Mr. Webb had mild tenderness on the right side of the L4-5 fusion. (CX 3 at 1). The remainder of the fused area was non-tender. (CX 3 at 1). He had a spot of referred pain on bending and certain other activities over his distal right buttock below the area of fusion. (CX 3 at 1). Dr. Edwards reported that the patient could perform straight leg raising without pain. (CX 3 at 1). The neurologic examination revealed very equivocal slight weakness of the patient's right quadriceps and inversion, and all other muscle groups were normal to manual testing. (CX 3 at 1). The claimant could do a deep knee bend symmetrically and walk on his heels, and had equal and normal knee and ankle reflexes. (CX 3 at 1). Dr. Edwards reported that the Claimant had mild sensory hyposthesia over the distal right L4 dermatome as well as the web space between his 1st and 2nd toes and the lateral aspect of his right foot. (CX 3 at 1).

Dr. Edwards reviewed the x-rays, and compared them to the 1995 films, finding no change. (CX 3 at 1). He reported that the bone scan was negative for increased spine activity, and that the EMG was compatible with very marginal right L4 root impingement. (CX 3 at 1). Dr. Edwards concluded that:

> Mr. Webb appears to have a solid fusion and maintenance of good alignment almost three years after his surgery. His recent fall appears to have caused low back strain in addition to a possible right sided L4-5 disc herniation. The right L4 root impingement is not causing pain or any clinically significant deficient. Therefore, I advised Mr. Webb to refrain from jumping or lifting more than 30 lbs., for the next six weeks in order to let the disc heal. There is over a 95% chance that this will occur. Should he have progressive weakness such that he is unable to walk on his heels, a myelogram would be indicated.

(CX 3 at 1). A note from Linda Haynes, Office Coordinator for Dr. Edwards, dated June 3, 1996, was included with Dr. Edwards report. The note indicated that Mr. Webb was advised to keep his driving below 30 miles per day until the end of June. (CX 3 at 2).

Report of Dr. Drury

A report from Dr. Drury, dated November 4, 1996, was submitted by Claimant as CX 4. The report indicated that Dr. Drury examined Claimant on March 18, 1996, when Claimant reported that he had slipped on a boat, fallen down, and hurt his back. (CX 4 at 1). Dr. Drury reported that the examination revealed no localizing signs, and the x-rays appeared unchanged. (CX 4 at 1). Dr. Drury thought that Claimant had probably stretched some of his scar tissue, and waited two weeks for Claimant to improve. (CX 4 at 1). Dr. Drury examined Claimant again on April 1, 1996, when Claimant reported that he was experiencing pain down the right lower extremity and numbness on the dorsum and lateral aspects of the foot. (CX 4 at 1). Dr. Drury indicated that the neurological exam was intact, and he recommended that the Claimant see Dr. Edwards, as he had performed the prior surgery. (CX 4 at 1). He also recommended a bone scan. (CX 4 at 1).

Dr. Drury examined Claimant again on April 11, 1996, at which time he reported that there seemed to be the slightest uptake in the L5 area, although the x-ray was read as normal by the radiologist. (CX 4 at 1). Claimant was examined by Dr. Edwards on May 5, 1996. (CX 4 at 1). Dr. Drury reported that "Dr. Edwards said that he thought he injured a disc underneath his fusion, and he thought it would resolve in about 3 months but didn't want him to do anything to cause bouncing such as riding in a boat or a rough truck, and he didn't want any lifting greater than 20 lbs. or stressful activity." (CX 4 at 1). The EMG showed a bilateral L5 neuropathy, and a new L4 neouropathy on the right. (CX 4 at 1).

In June 1996, Dr. Drury saw Claimant and reported that claimant was experiencing decrease in sensation in the medial leg and dorsum of the foot. He examined Claimant again on June 27, 1996, when Claimant stated that driving more than 20 miles caused him to have more tingling. His exam was basically normal, and Dr. Drury stated that he could try to go back to work on July 15, 1996. Dr. Drury noted that "this is a very difficult injury to patten out after his previous extensive surgery, and I do rely on Dr. Edwards' evaluation." (CX 4 at 1).

As part of the CX 4 exhibit, Claimant also included a not from Dr. Drury dated December 8, 1997, in which he reviews the dates of various events in relation to claimant's injury.

Report from Trace America, Inc.

The Employer submitted a report dated August 28, 1996 from Trace America, Inc. as EX 6. The report indicated that no employment information since the accident was recovered. (EX 6 at 2). The report stated that Claimant has a membership at Shawnee Country Club and has been seen golfing at this club as early as 1996. (EX 6 at 3). The report summarized a conversation with Bill Barnard, who stated that Claimant plays golf a lot, but not as much as he used to. (EX 6 at 3). Mr. Bernard also stated that Claimant and his wife have a Nordic Track machine which they do not use. (EX 6 at 3).

The report contained a summary of a conversation with "Linda" from the membership office at the Shawnee Country Club. (EX 6 at 3). Linda stated that Claimant is a member of the club and that his membership is renewable every year. (EX 6 at 3).

The Report summarized a conversation with "Chris," the Assistant Golf Pro. at the Pro Shop at the Shawnee Country Club. (Ex 6 at 3). He stated that he just started working at the Country Club and did not know much about Claimant's golfing activity. (EX 6 at 3).

The Report summarized a conversation with Mr. Joe Wallaston, the Head Pro at Shawnee Country Club. (EX 6 at 4). Mr. Wallaston stated that he has known Claimant for a few years, and he knows that the Claimant is a member of the club and that he plays golf at this club. (EX 6 at 4). Mr. Wollaston stated that Claimant plays sometimes a few times a week and has played as recently as early August 1996. (EX 6 at 4). He stated that he has seen the Claimant play golf, and that he is a good golf player. (EX 6 at 4). He also stated that he has not seen the Claimant in a few weeks, but that he did see the Claimant earlier this month at the club. (EX 6 at 4).

Statement of Captain Zdenko Silvestric

Employer submitted the statement of Captain Zdenko Silvestric as EX 7. The statement states that Capt. Silvestric currently serves as Master on the Mt Nord Baltic. (EX 7). Capt. Silvestric stated that on March 15, 1996 at approximately 1115 hrs, he was in the office when Mr. Webb entered and stated that he had fallen on the catwalk and injured his back. (EX 7). Capt. Silvestric asked Mr. Webb to show him where he fell, and Mr. Webb took Capt. Silvestric and Tony Mokienko to the catwalk in the area of the 3-4s DBTK vent on the starboard side of the vessel. (EX 7).

Capt. Silvestric stated that Mr. Webb told him that as he was walking down the forward end of the catwalk he had placed his right foot on the tread and his left foot on the plate. (EX 7) Mr. Webb told him that when he placed his left foot on the plate it slipped causing him to fall. (EX 7) Capt. Silvestric stated that Mr. Webb said that he was not using the railing, and that he was carrying a bag of sample bottles in his right hand and a sample bottle under his left arm. (EX 7) Capt. Silvestric stated that he inspected the area and found no oil or other slipping or tripping hazard in the area. (EX 7).

Report of Dr. Ronald Greene

Dr. Greene evaluated Claimant on August 24, 1994. (EX 8 at 1). A copy of the report he made at the time of that evaluation was attached to the current report, and he summarized the pertinent points of that report. (EX 8 at 1). Dr. Greene reviewed a record from Dickinson Medical Group dated 5/9/96 allowing light work, an x-ray report from 3/15/96, a bone scan reprot from 4/8/96, a 4/11/96 note from Dr. Drury excusing Claimant from work, prior notes including a 3/18/96 excuse from work, a report of an EMG study dated 4/26/96, and Dr. Edward's report dated 4/30/96. (EX 8 at 2).

Dr. Greene reported that according to the records in his possession, it appears that the Claimant may have suffered a lumbar strain on 3/15/96. (EX 8 at 2). He noted that despite the results of the EMG study, Claimant had no neurologic deficits. (EX 8 at 2). Dr. Greene opined that a minor strain imposed upon a solid fusion is usually a minor injury. (EX 8 at 3). He stated that one would expect this type of injury to clear up within a few days to several weeks. (EX 8 at 3). Dr. Greene opined that the three months Mr. Webb was out of work is the outside limit that one would normally expect in recovery from an uncomplicated back strain. (EX 8 at 3).

Dr. Greene noted that none of the records usually addresses the issue of whether an injury actually occurred on 3/15/96, and whether that injury actually caused a disabling injury. (EX 8 at 3). Dr. Greene reviewed the 4/30/96 note from Dr. Edwards, stating that:

> If one reviews the 4/30/96 note of Dr. Edwards, one finds that there was some mild tenderness in the right side at the L4-L5 area with a spot of referred pain on bending over the distal right buttock below the are a of the fusion. Straight leg raising was painless. The neurologic examination showed equivocal slight weakness of the right quadriceps and inversion.. This would not be related to the L4-L5 area. Other muscle groups were normal. He was able to do a deep knee bend and walk on his heels some distance. There was no clinically significant weakness. He had equal and normal knee and ankle reflexes. He had a mild sensory hypesthesia in the distal right L4 dermatome as well as the web space between his right and second toes and the lateral part of the right foot. There is no notation about whether this existed from his prior surgery.

(EX 8 at 3). Dr. Greene notes that this note raises an issue as to whether Mr. Webb had any type of disability at that particular time. (EX 8 at 3). He also states that based upon these records, one would have expected an uncomplicated recovery, as predicted by Dr. Edwards. (EX 8 at 3).

Additional Evidence of Record

In addition to the evidence summarized above, Claimant submitted the following evidence: Employer's Report of Injury / Illness dated March 15, 1996 and Benefit Request for Disaiblity dated 4/29/96 (CX 1); Dr. Drury's duty status slips dated 3/18/96, 4/3/96, 4/11/96, 5/9/96, 5/13/96, and 6/27/96 (CX 2); Tidewater Electromyelography Report dated 4/26/96 (CX 5); Milford Memorial Hospital x-ray report dated 3/15/96 (CX 6); Milford Memorial Hospital Bone Scan Report dated 4/8/96 (CX 7); and Medical Bills from Tidewater EMB, Dr. Drury, Dr. Edwards, Milford Diagnostic, Dr. Aaron Green E.R., and Dr. Drury for the bone scan (CX 8); Letters from Joseph Walloston (CX 9); Letter from Gina M. Timmons (CX 10); and a photograph (CX 11). Employer submitted the following evidence: Milford Memorial Hospital Emergency Department Report dated March 15, 1996 (EX 1); Recorded statement of the claimant dated April 24, 1996 (EX 2); Employee Request for Disability (EX 3); Dickinson Medical Group Report dated May 9, 1996 (EX 4); Dickinson Medical Group note dated June 27, 1996 (EX 5); Decision and Order dated December 6, 1995 (EX 9); Letter from Victor Epps (EX 10); and

Claim Petition (EX 11). Additionally, a stipulation sheet was submitted as a joint exhibit (JX 1). All of this evidence has been carefully considered in the course of evaluating the Claimant's case.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459 (1968) *reh'g. den.* 391 U.S. 929 (1968); Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985).

The Act provides a presumption that a claim comes within the provisions of the Act. *See* 33 U.S.C. 920(a). This §20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the allegations necessary to state a *prima facie* case. The Supreme Court has held that a *prima facie* claim for compensation, to which the statutory presumptions refers, must at least allege an injury that arose in the course of employment as well as out of employment. Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., et al., v. Director, OWCP*, 455 U.S. 608 (1982), *rev'g Reiley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (CADC 1980). In order for § 20(a) to apply to causation, Claimant must establish a *prima facie* case by proving that the Employee suffered some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. *Kalaita v. Tripple A Machine Shop*, 13 BRBS 326 (1981). Once Claimant establishes the two elements of his *prima facie* case, the § 20(a) presumption applies to link the harm or pain with Employee's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985).

In the current case, Claimant has offered evidence to establish that he suffered injury, and that an accident occurred which could have caused the injury. He has offered his own creditable testimony, in which he stated that he fell while walking on a catwalk, striking the lower part of his back on a flange. (TX 44). He also offered Dr. Edwards' notes and Dr. Drury's Reports, which indicate that the Claimant suffered low back strain in addition to a possible right sided L4-5 disc herniation. (CX 3 and 4). This is consistent with the EMG results, which show a very mild acute compromise of the right L-4 nerve root. (CX 5). Claimant's testimony is corroborated by the fact that immediately after he fell, he reported the accident to the Captain of the ship, and told another SGS employee on the ship about the accident. Additionally, immediately after he was off the ship, he reported the accident to his Employer. Claimant has testified that there was one witness to the

accident, a crew member named Suparno, who was standing within five feet of him at the time of the fall. (TX 37). Claimant stated that he was not sure whether the crew member was looking at him when he fell, but testified that he saw him laying on the ground after the fall. (TX 99). Additionally, after the accident, Claimant went home and got his old x-rays, then went to the hospital. (TX 54). Claimant testified that he wanted to bring his old x-rays with him to the hospital to "make sure everything was intact and there was nothing wrong where I had my prior surgery." (TX 54).

Employer argues that the Claimant is not credible and highlights inconsistencies in the Claimant's testimony. However, I find these inconsistencies to be minor and unimportant, and I find that the Claimant's testimony is supported by the medical opinion evidence in this case. Accordingly, I find that the Claimant has submitted sufficient evidence to establish a *prima facie* case by showing that an accident occurred and that Claimant suffered injury.

The §20(a) presumption places the burden on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by Claimant's employment. Swinton v. Kelly, 554 F.2d 1075 (D.C. Cir. 1976). The relevant inquiry thus becomes whether the employer succeeded in establishing the lack of causal nexus. Downes v. General Dynamics, 14 BRBS 324 (1981). When there has been a work-related accident followed by an injury, the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove other agency of causation to rebut the presumption. Stevens v. Todd Pacific Shipyards, 14 BRBS 626 (1982). Once an employer offers sufficient evidence to rebut the presumption - the kind of evidence a reasonable person might accept as adequate to support this conclusion - only then is the presumption overcome and it no longer controls the result. Travelers Insurance Co. v. Belair, 412 F.2d 297 (1st Cir. 1969). Once the §20(a) presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all the evidence and resolve the case based upon the record as a whole. Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982).

In the current case, employer has not offered sufficient evidence to rebut the presumption. In its brief, employer argued that inconsistencies in the reports of the incident and the fact that there were no eyewitnesses to the incident is sufficient to rebut the presumption. However, I find that the inconsistencies pointed out by Employer in its brief are not sufficient to rebut Mr. Webb's creditable testimony. For example, Employer notes that Claimant sometimes described where he fell as a "catwalk" and sometimes described it as a "ramp." Employer has offered the testimony of Tom Bayerle, who testified to his understanding of the meaning of the words "ramp" and "catwalk." However, I note that Capt. Silvestric in his report used the term "catwalk" to describe where Claimant fell. (EX 7). Capt. Silvestric did not indicate that this term created any ambiguity as to where the accident occurred. Accordingly, I do not find this discrepancy sufficient to impeach Claimants' testimony, as different people may use different words to refer to the same thing. Moreover, Employer noted that in the Claim Petition, Claimant indicated that both feet slipped, while Capt. Silvestric's report indicates that Mr. Webb told him that when he put his left foot down, it slipped causing him to fall. However, upon review of Claimant's testimony, I find

that he reconciled this discrepancy. Claimant stated that he did not agree with Capt. Silvestric's report, and testified that "I told him when I stepped down on the skid bar, which was probably about maybe six inches, when my other foot stepped down, my feet were gone." (TX 107).

Claimant testified that a crew member witnessed the fall. (TX 45). Employer notes that Claimant had given an earlier statement that he did not know whether the crew member witnessed the fall. At the hearing, however, Claimant stated that he was not certain whether the crew member had been looking at him before the fall, however, the crew member saw him laying on the ground immediately after the fall. (TX 96-99). I note that these statements are not inconsistent, and therefore do not diminish Claimant's credibility.

To show that Claimant was not injured, Employer offers evidence that Claimant was golfing during the period after his injury. Specifically, Employer has offered Trace America's report which includes a statement by Joe Wollaston, the Head Pro at the Shawnee Country Club, in which he indicated that he has seen "the subject" play golf a few times a week and as recently as August 1996. (EX 6). However, the Claimant has offered a letter from Mr. Wollaston, in which Mr. Wollaston indicates he has seen Claimant's son Dax play golf at the club, not Claimant. (CX 9). In a second letter from Mr. Wollaston, he indicated that his first letter was written in response to Trace America's report. (CX 9). Additionally, Claimant has offered a letter from Gina M. Timmons, the General Manager of the Shawnee Country Club. In this letter, Ms. Timmons indicated that at the beginning of the 1996 fiscal year, she authorized Mr. Webb's son "Dax" to use Mr. Webb's account for golfing, food, and beverage charges, since Mr. Webb was no longer able to golf due to back injuries. (CX 11). Trace America's report does not provide any information as to how "the subject" was described to Mr. Wollaston. Accordingly, it is not clear that Mr. Wollaston was referring to Claimant at the time of his statement to Trace America. Therefore, I find that Trace America's report does not sufficiently establish that Claimant was not injured or has played golf directly after the accident.

Employer has also offered the report of Dr. Ronald Greene, in which Dr. Greene notes that Claimant was out of work for three months, and opines that "his three month period really represents the outside time limit that one would normally expect in recovery from an uncomplicated back strain." (EX 8 at 3). Additionally, Dr. Greene opined that "Claimant's medical care was necessitated by age related decompensation of his pre-existing genetic abnormality in the lower back." (EX 8 at 1). However, Dr. Greene does not opine that an injury did not occur, and notes that he did not evaluate Claimant personally and has no personal knowledge of his actual physical condition. (EX 8 at 3). Accordingly, I find that Dr. Greene's opinion is entitled to little weight.

Upon review of all the evidence submitted in this case, I find that Employer has not rebutted Claimant's *prima facie* case. As previously noted, I find Claimant's testimony to be credible. Accordingly, I find that Claimant has established that an accident occurred, that he suffered injury, and that his injury was caused by his accident pursuant to §20(a).

Suitable Alternate Employment

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. If Claimant meets this burden, Employer must establish the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, taking into consideration Claimant's age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Mills v. Marine Repair Service, 21 BRBS 115, 117 (1988); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976), *aff'g.* 2 BRBS 178 (1975); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59, n.7 and related text (3d Cir. 1979). If Employer satisfies its burden, then Claimant, at most, may be partially disabled. Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 24 BRBS 213 (9th Cir. 1991); Dove v. Southwest Marine of San Francisco, Inc., 18 BRBS 139 (1986). However, Claimant can rebut Employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986).

Dr. Drury cleared Claimant for light duty employment on May 9, 1996. (TX 66). Claimant notified Tom Bayerle, who indicated that Employer did not have any light duty work available. (TX 66-67). Subsequently, Employer offered Claimant a job in the Bridgeport, New Jersey office. (TX 74). Claimant testified that to work at the Bridgeport, New Jersey office, he would have to travel approximately 100 miles each way. (TX 75). This job clearly did not meet the standard of suitable alternative employment, as Employer indicated that Claimant could not come to the office until "they were categorically told that it was okay by the doctor." (TX 173). However, when Claimant asked his physician for clearance, his physician specifically stated that Claimant was not cleared to perform this job, because the driving requirements were too great. (TX 142). Accordingly, I find that the employment offered by Employer did not meet the standard of suitable alternate employment.

Claimant admitted that his used car business was operational during the period of his disability. (TX 125). He stated that he only made two purchases of cars during the disability period, and states that he made no income from these sales. (TX 126). In its Proposed Findings of Fact and Conclusions of Law, Employer argued that the court should be very suspicious of this testimony. In the absence of evidence to the contrary, however, I find that Claimant's testimony regarding his used car business is credible. Accordingly, I find that Employer has not established the existence of suitable alternate employment, and find that Claimant had a period of total disability from March 15, 1996 to July 16, 1996.

Was Claimant's treatment related to his injury?

The sole remaining issue is whether Claimant's treatment was related to his injury. Employer has offered the opinion of Dr. Greene, who opines that Claimant's treatment was necessitated by a pre-existing genetic condition. (EX 8). However, as noted above, I find that Dr. Greene's opinion is not entitled to much weight. In contrast, Dr. Edwards report indicated that Claimant's fall caused low back strain in addition to a possible right sided L4-5 disc herniation. (CX 3). Additionally, I note that Dr. Edwards and Dr. Drury both indicate that Claimant's treatment was necessitated by his injury, and Dr. Drury specifically states in his report that he relied on the opinion of Dr. Edwards. (CX 4 at 2). As Dr. Edwards and Dr. Drury both examined the Claimant after his injury, I find that their opinions are entitled to greater weight on this issue than the opinion of Dr. Greene, who has not examined Claimant since 1994 and merely reviewed the medical records regarding Claimant's current complaints. Accordingly, I find that Claimant's treatment was related to his injury.

Attorney's Fees

Claimant's attorney has submitted a petition for counsel fees dated June 12, 1998, requesting $13,788 in fees and $525.55 in costs. By letter dated June 16, 1998, Employer moved to strike Claimant's Petition for Attorney Fees, arguing that the Petition was untimely. In the event that Employer's Motion to Strike was denied, Employer requested discussion on the reasonableness of the fees requested for the work performed. It is suggested that the parties come to agreement on the issue of Attorney's Fees. Therefore, it is recommended that the parties contact the office of the undersigned Administrative Law Judge within 30 days from the date of this Decision and Order to arrange a conference regarding this issue.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record, I issue the following Order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS ORDERED THAT:

1. Claimant is entitled to compensation based upon his average weekly wage for total temporary disability from March 15, 1996 to July 15, 1996. The actual amount shall be determined by the District Director. The parties stipulate that the average weekly wage is $708.34.

2. Claimant is entitled to payment of medical expenses in the amount of $2,324.09, as stipulated by the parties.

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PAUL H. TEITLER
Administrative Law Judge

Dated: January 27, 1999
Camden, New Jersey